United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

75-4052

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-4052

TNT TARIFF AGENTS, INC. and NATIONAL CARLOADING CORPORATION,

Petitioners,

v.

THE INTERSTATE COMMERCE COMMISSION, and UNITED STATES OF AMERICA,

Respondents.

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P/S

BRIEF OF INTERVENOR,

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.

ON PETITION FOR REVIEW FROM ORDER OF THE

INTERSTATE COMMERCE COMMISSION

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ON PETITION FOR REVIEW FROM ORDER OF THE

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STATEMENT OF THE ISSUES PRESENTED

As noted by the Petitioners herein, the principal issue presented in this proceeding is whether or not the subject orders of the Interstate Commerce Commission, which found Petitioners' tariff unjust and unreasonable, and which further cancelled and annulled said tariff, were arbitrary, capricious, erroneous in fact and law, or unsupported by substantial evidence. It is the position of Intervenor Rocky Mountain Motor Tariff Bureau, Inc., hereinafter RMB, that the record before the Court fully substantiates the Commission's finding that the subject tariff was unjust, unreasonable and otherwise unlawful, and that the

orders before this Court should be affirmed. As Intervenor, RMB was the protestant in Docket No. 35921 (Sub No. 1). Our argument is directed primarily at Petitioners' contentions with regard to that proceeding. However, as can be seen from Petitioners' Brief, the issues in both the lead docket and Sub No. 1 proceeding were virtually identical.

STATEMENT OF THE CASE

Petitioners adequately stated the movement of the Sub No. 1 proceeding through the Commission's procedures. We would only reiterate, as we have before the Commission, that TNT's Tariff No. 14, I.C.C.-F.F. No. 15, Item 52000 (referred to by Petitioners as "Tariff West") became effective for Petitioner National Carloading Corporation due to a failure to symbolize the tariff change which, in effect, left this Intervenor without notification of its effectiveness. (JA 293a, 310a) Consequently, RMB was unable to protest said publication at its inception. More than 300,000 tariff filings are made annually with the Interstate Commerce Commission by the thousands of common and contract carriers subject to its jurisdiction. In order to facilitate review of new or changed tariff matters, as distinguished from republication of previously effective matter, the Commission's regulations require the identification of tariff changes by appropriate symbols. 49 C.F.R. §1307.27, §1309.1. Therefore, references by Petitioners to the fact that the involved tariff became effective without protest are certainly tainted and should be accorded no weight.

ARGUMENT

THE ORDERS BEFORE THIS COURT FOR REVIEW ARE FULLY SUPPORTED BY THE EVIDENCE OF RECORD; ARE NOT ARBITRARY, CAPRICIOUS, OR ERRONEOUS IN FACT AND LAW, AND THEREFORE, SHOULD BE AFFIRMED.

I.

PETITIONERS' SPURIOUS DISTINCTION BETWEEN "DOCK RATES" AND ALLOWANCES DOES NOTHING TO ALTER THE VALIDITY OF THE COMMISSION'S ORDERS IN THIS PROCEEDING.

Petitioners' lengthy attempt to distinguish between dock rates and allowances does more to cloud than clarify the issues in the instant proceeding. What the Commission had before it was a publication by TNT Tariff Agents, Inc. providing a conversion table by which any applicable full service rate, including pickup service, could be reduced by exactly one dollar per hundredweight on any shipment delivered to the forwarder's terminal. The effect of the proposal was succinctly stated by the Administrative Law Judge in his Initial Decision in the Sub No. 1 proceeding (Joint Appendix 310a):

> The rules in the agency tariff have the effect of reducing by $1.00 per 100 pounds published full service rates, that is rates under which the freight forwarders are obligated to provide a pickup service, when shipments are delivered to the freight forwarders at their facilities, in lieu of the freight forwarder provided service. The $1.00 per 100 pounds reduction is accomplished through the application of conversion table (Column D of Note 1) or by applying the reduction directly to existing rates which provide for a forwarder pickup. The $1.00 per 100 pound reduction in rates which provide for a forwarder pickup is applied uniformly to all shipments tendered, regardless as to the location of the terminals or the size of shipments.

Section 415 of the Interstate Commerce Act (49 U.S.C. Section 1015) speaks directly to the subject of allowances made by forwarders to shippers who perform a transportation service for the forwarder:

> If the owner of property transported in service subject to this part directly or indirectly renders any service connected therewith, or furnishes any instrumentality used therein, the charge and the allowance therefor, to such owner, shall be published in tariffs filed in the manner provided in this part and shall be no more than is just and reasonable...

Thus, in terms of tariff publication, the forwarder might have in its tariffs only full service rates and a corresponding section providing specified amounts to be refunded if the shipper delivers the shipment to the forwarder's facility, or as in the instant proceeding, simply allow for a deduction from the otherwise applicable rate when the shipper brings the shipment to the forwarder's dock. *In either event, an allowance is being made for the exact service rendered, to wit, delivery by the shipper to the forwarder's terminal.* Petitioners contend that vis-a-vis "dock rates," allowances are a "horse of a different color." We submit that "A rose by any other name is still a rose."

Petitioners contend at page 22 of their Brief that Commission precedent is irrelevant, because the cases cited dealt with allowances, rather than "dock rates." Petitioners, for example, suggest that a cursory reading of *Freight Forwarder Allowances at Baltimore, Maryland,* 315 I.C.C. 719, 721, reveals that the parties involved designated the tariff as an allowance. Rather than a cursory reading, we would ask the Court to carefully consider the Commission's decision in that proceeding. Two forwarders in that proceeding, ABC Freight Forwarding

Corporation and Lifschultz Fast Freight, proposed reductions on their rates when shippers performed pickup service. At page 720 of the decision, the Commission noted the following:

> ABC presently accords shippers at Baltimore an allowance of 5 cents for performing their own pickup service. Lifschultz's present *dock rates* from Baltimore to Chicago *reflect a 15-cent allowance in lieu of pickup* on shipments which weigh less than 5,000 pounds, and a 5-cent allowance in lieu of pickup on shipments weighing 5,000 pounds or more. (Emphasis supplied.)

Thus, in that decision, the Commission explicitly recognized that the publication of a dock rate involved an allowance. And there (at page 721), as here, the Commission noted that Section 415 of the Act prohibits allowances to be paid by freight forwarders which are "more than just and reasonable." Thus, in the instant proceeding, the Commission had no alternative but to inquire into the justness and reasonableness of a published provision which amounted to a $1.00 allowance when a shipper delivers freight to the forwarder's terminal.

The United States Supreme Court has previously directed itself to the issue of allowances when a reduction from the otherwise applicable rate was involved. In *Lehigh Valley R. Co. v. United States*, 243 U.S. 444, 61 L. Ed. 839 (1917), a shipper received from the railroad a reduction in its published rates and also an annual salary of $5,000 in consideration of delivering shipments to that railroad. Mr. Justice Holmes, delivering the opinion of the Court, stated at page 446:

> ...Of course *it does not matter whether the allowance takes the form of a deduction or a cross payment.* Any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words. (Emphasis supplied.)

At page 445, Justice Holmes recognized that a reduction in the otherwise applicable rate is no less a payment than an actual refund of total charges collected. At page 445, he stated:

> By arrangement with the appellant, so far as it is able it sends the goods over the appellant's line, and for doing so receives from it a varying percentage upon the published rates and also a salary of $5,000 a year. *These payments* by the appellant are the ground of the bill. (Emphasis supplied.)

In the instant proceeding, Item 52000 of the subject tariff reduces the full service rate of the Petitioners by $1.00 per hundredweight if pickup service is performed by the shipper. Regardless of the form of payment the forwarders choose - a deduction or cross payment - the publication still involves an allowance. *Lehigh Valley R. Co. v. United States, supra; Merchants' Warehouse Co. v. United States,* 44 F. 2d 379, 386 (E.D. Pa., 1930). Therefore, Petitioners' unsupported contention that Commission and Federal Court precedent involving allowances are not relevant cannot stand scrutiny. At a minimum, all decided cases stand for the proposition that an allowance can be no more than is just and reasonable - as determined by the Commission after a review of the evidence. *Allowance for Privately Owned Tank Cars,* 258 I.C.C. 371, *Combined Bill of Lading - Freight Bill Allowance, Eastern Central States,* 323 I.C.C. 168, *Delivery Allowance in Central Territory,* 309 I.C.C. 187, *El Dorado Oil Works v. United States,* 328 U.S. 12 (1946), *Freight Forwarder Allowances at Baltimore, Md., supra, Morgain Forwarding Co., Pickup and Storage,* 258 I.C.C. 771, *New York Central Railroad Company v. United States,* 199 F. Supp. 955 (S.D.N.Y. 1961), *Pickup and Delivery Allowance at Detroit, Michigan,* 301 I.C.C. 319, and *Pickup and Delivery*

Allowance at St. Louis and Kansas City, 64 M.C.C. 163. The statutory provisions dealing with allowances are identical for both the railroads and freight forwarders, so that precedent developed with respect to the railroads applies with equal force to the forwarders. Compare 49 U.S.C. 15(13) and 49 U.S.C. 1015 set forth in the addendum hereto.

A literal acceptance of Petitioners' argument would lead to the conclusion that mere publication by TNT of the involved "dock rates" makes them lawful. While such provisions may be legally effective after publication, they are always open to investigation by the Commission upon its own motion, as occurred in the instant proceeding, or by complaint from any person. 49 U.S.C. 1006(b). We respectfully submit that the evidence presented by the Intervenors before the Commission in this proceeding showed beyond a doubt that the subject provisions were unlawful.

Petitioners' continued references to the fact that various "dock rates" have been in existence for "many, many years" does nothing to alter the validity of the Commission's decision in this proceeding. The issue before the Court is the justness and reasonableness of the specific tariff provisions published by TNT, and whether the Commission's order directing cancellation of said tariff publication is based on sufficient evidence.

II.

THE EVIDENCE BEFORE THE COMMISSION FULLY JUSTIFIED ITS CONCLUSIONS AND FINDINGS IN DOCKET NO. 35921 (SUB NO. 1).

As was noted by the Commission in the Sub No. 1 proceeding (JA 313a), to be just and reasonable an allowance resulting from delivery of a shipment by a party to a forwarder's facility, in lieu of using the available pickup service of the forwarder, must be commensurate with the facilities furnished and the service performed. It should not exceed the cost of the forwarder or the shipper for providing the service. See *Freight Forwarder Allowances at Baltimore, Md., supra.* It is well settled that shippers who pick up or deliver their own goods to or from a carrier's terminal, in lieu of the carrier's services, are only entitled to a *reasonable* compensation commensurate with the facilities furnished and the services performed. *United States v. Baltimore and Ohio R. Co.*, 231 U.S. 274 (1913).

As noted previously, under Section 415 of the Interstate Commerce Act, 49 U.S.C. 1015, an allowance to a shipper may be no more than is just and reasonable. There are two basic criteria for making this determination, namely, (1) the allowance must not exceed the carrier's cost of providing the service, and (2) an allowance must not exceed the shipper's cost of providing the service. See *Pickup and Delivery Allowance, St. Louis and Kansas City, supra.* Whichever of these sums is the lower marks the maximum the carrier may pay. See *Allowance for Privately Owned Tank Cars, supra.* The principle underlying these decisions is that an allowance which exceeds the shipper's cost of providing the service is, in effect, a rebate, and that such an

allowance is, therefore, not "just and reasonable" as required by the statute. The Commission has been sustained in this interpretation of the law. *El Dorado Oil Works v. United States*, 328 U.S. 12 (1946), *New York Central Railroad Company v. United States*, 199 F. Supp. 955 (S.D.N.Y. 1961).

RMB, in the Sub No. 1 proceeding, submitted cost evidence utilizing the Commission's Cost Statement 2C1-71 (JA 289a) to show that the average pickup costs are only 33.3 cents per hundredweight on a typical 5,000 pound shipment moving in the Transcontinental Territory. In contrast, the published provisions allow a flat $1.00 per hundredweight reduction in the otherwise applicable rate. Thus, RMB had made a *prima facie* showing that to reduce rates by $1.00 per hundredweight for the delivery of shipments to the forwarder's terminal would result in an unlawful allowance.

In passing it may be noted that any flat reduction, such as published by TNT in this instance, is obviously not cost-related. It is a universally recognized fact that there is a tapering effect in costs with increasing shipment weights. In other words, per hundredweight it costs less to pick up a truckload shipment of 40,000 pounds than an LTL shipment of 5,000 pounds. This is necessarily true because the fixed costs of the pickup service are spread over a larger volume shipment. Therefore, the provision published by TNT was, on its face, unrelated to the costs of either the forwarders or the shippers, and it was, therefore, on its face unjust and unreasonable.

To soften the impact of this showing, National and TNT allege that a comparison of motor carrier costs with forwarder costs is wholly inappropriate. This same argument was advanced by the Petitioners in Respondent's Exceptions to the Initial Decision of the Administrative Law Judge (JA 315a) at page 4 (JA 319a). In this Protestant's reply to those exceptions (JA 322a), we noted at page 6 (JA 328a) that the involved pickup service must involve a truck, a driver and similarly traversed streets for forwarders and motor carriers. This, of course, would be equally true for shippers performing such service. Thus, Petitioners' allegations that motor carrier costs are not relevant is without merit.

In an attempt to create a distinction between motor carrier costs and freight forwarder costs, Petitioners, at page 37 of their Brief, allege that a difference arises because forwarders are limited to serving only within commercial zones with their own equipment. They indicate that the forwarders must utilize the services of motor common carriers to serve points outside commercial zones or terminal areas. In making this argument, TNT ignores the distinction between linehaul costs and pickup and delivery costs. Under the administration of the Act by the Interstate Commerce Commission, the commercial zones of the motor carriers and the terminal areas of the freight forwarders are coterminous. See *Ex Parte No. 266 (Sub No. 1), Investigation into the Scope of Freight Forwarder Terminal Areas*, 343 I.C.C. 565, 567. For both the motor carriers and the freight forwarders, the rates named to a point have application within the commercial zone or terminal area of that

point. Beyond that boundary different rates apply, additional linehaul costs are incurred and the total costs of service are, therefore, different. Pickup and delivery costs are those costs which occur within the commercial zone. Within that zone operations are identical for both the motor carriers and freight forwarders, i.e., the shipments must be picked up through the use of a truck and a driver operating over the same city streets.

This same failure to distinguish between pickup and delivery costs and linehaul or interline costs is apparent at page 37 of Petitioners' Brief where it refers to expenditures by the freight forwarder industry for cartage *and interline* of $9,473,067 for an average cost per hundredweight of $3.15. Interline costs would include costs of further linehaul transportation to points beyond the freight forwarder's terminal area. Under Section 409 of the Interstate Commerce Act, 49 U.S.C. 1009, freight forwarders are authorized to enter into contracts with motor carriers for linehaul transportation up to a distance of 450 miles. Obviously, those expenses to which Petitioners refer include far more than pickup and delivery.

Moreover, since the freight forwarders are not obligated to, and, in fact, may not perform transportation service outside their terminal area, it is unlawful for them to pay an allowance for any transportation service performed by a shipper outside the terminal area. Payment of such allowance would be contrary to the decision in *United States v. Baltimore and Ohio R. Co., supra.* In that case the Supreme Court held that sugar refiners whose plant was situated some ten miles

beyond the limits of the free lighterage zone established by the railroads for the delivery of freight within the Greater New York area were not entitled to an allowance from the railway companies for services in lightering their sugar to the railroads' terminals. Other decisions of the Interstate Commerce Commission have consistently observed the principle that an allowance may not be paid for services which the carrier is not obligated to perform. See *Propriety of Operating Practices - Terminal Services*, 209 I.C.C. 11, 30 (1935), *Worth Steel Co. Terminal Services*, 277 I.C.C. 385 (1950), and *Pickup of Multiple Shipments at Rochester, New York*, 309 I.C.C. 413 (1960).

Indeed, we are still left in suspense concerning Petitioner TNT's position on this matter, when we consider its Petition for Reconsideration and for Further Hearing (JA 336a), in which the Verified Statement of Craig F. Rockey (JA 351a) appears. Relative to determining costs for shipments delivered to the forwarder's terminal, Mr. Rockey at page 2 of his statement (JA 352a) stated the following:

> This pickup service could be performed by any one of these operations: (1) a freight forwarder using his own truck, (2) a local cartage company hired by either the freight forwarder or the shipper, or (3) the shipper himself using his own truck. *In any case, there is no reason to assume that the physical operations, the equipment, or the man-hours required differ significantly as between these three types of operators.* (Emphasis supplied.)

Thus, while we cannot be sure of Petitioner's position, vis-a-vis forwarder v. motor carrier costs for providing pickup service, we note that once RMB had presented *prima facie* evidence that the published allowance would exceed trucking costs by a substantial amount, the burden shifted

to the Petitioners to rebut this *prima facie* case and to prove that forwarder *and* shipper costs would be higher. In this regard, *no evidence whatsoever* was submitted with regard to the costs shippers would incur in performing such service on behalf of the forwarders. As noted by the Administrative Law Judge in his Decision in the Sub No. 1 proceeding (JA 313a):

> Even if the Commission should accept respondents largely unsupported statement that forwarder pickup costs are skyrocketing and respondents $1.57 per 100 pound forwarder pickup costs from Ex Parte No. 296, supra, *respondent did not attempt to show the pick-up costs when the shippers provide such services themselves.*
>
> In this judges opinion, protestant made out a prima facie case that granting $1.00 per 100 pounds for delivery of shipments to a forwarder's facilities in lieu of a forwarder provided service, pursuant to Item 52,000 of the TNT tariff is unjust and unreasonable. (Emphasis supplied.)

Thus, having shown the Commission that the subject tariff publication resulted in an exorbitant, unjust and unreasonable allowance to shippers for providing pickup service to the forwarder's terminal, RMB presented a *prima facie* case that such allowance would be unlawful. The burden then shifted to the Petitioner to come forward with evidence to justify its publication. This the Petitioner failed to do.

Contrary to TNT's continual reiterations that the $1.00 per hundredweight reduction was not an allowance, the foregoing clearly establishes that the involved publication involved an allowance. TNT contends that it would defy logic to compare the $1.00 reduction with existing 5¢, 10¢ or 15¢ per hundredweight allowances presently published by many motor carriers. Certainly, it would also defy logic to permit the forwarders to reduce full service rates by $1.00 per hundredweight

for shipper performance of pickup service, when presently effective allowance in lieu of pickup provision *in forwarder tariffs* provide only 5¢ or 10¢ for the identical service. Thus, the publication increased the previously effective allowances by more than 1,000%. The alternative methods of tariff publication cannot obsfucate the forwarder's intent.

It was also noted by the Administrative Law Judge in his Decision (JA 313a) that:

> Unjust and unreasonable rates and practices can result, contrary to the National Transportation Policy, in unfair and disruptive competitive practices, not only among carriers within the same mode of transportation, but with carriers in other modes as well.

In this regard, RMB had pointed to a letter from a "supporting shipper," Mr. George W. Fogel of the Hand Tool Division of Dresser Industries, wherein Mr. Fogel stated that he had diverted traffic from common carriers to avail himself of TNT's lower rate structure (JA 291a). TNT answers that the proposal was not "designed" to divert traffic from competing regulated motor carriers. However, the fact remains, that Petitioner, through its own evidence, established that the allowance provided for under the involved publication would provide the necessary incentive to divert substantial amounts of traffic from the regulated motor carriers. TNT's claim that it was not designed to do so is irrelevant.

III.

HAVING BEEN PRESENTED A *PRIMA FACIE* CASE, WHICH STOOD UNREBUTTED BY TNT, THE COMMISSION ACTED PROPERLY IN FINDING THE TARIFF PUBLICATION UNLAWFUL AND ORDERING ITS CANCELLATION.

Petitioners contend at page 43 of their Brief that neither the I.C.C., Eastern, nor RMB could establish a *prima facie* case, because the evidence presented which pertained to motor carrier costs, rather than freight forwarder costs, was of no probative value and should have been excluded. Such a contention is without merit. We have previously explained how motor carrier costs are appropriate in determining the pickup costs that would be incurred by a forwarder, motor carrier, or shipper in providing delivery service to the forwarder's terminal. Indeed, as we noted, Petitioner's own tendered expert agreed on this point. (JA 352a)

In actions to annul and set aside orders of the Interstate Commerce Commission, the scope of judicial review is restricted. The Court can only consider whether the action of the Commission is supported by "substantial evidence" on the record viewed as a whole. Substantial evidence is "...enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *National Freight, Inc. v. United States,* 359 F. Supp. 1153, 1156 (D.C. N.J. 1973), *Metropolitan Shipping Agents of Ill., Inc. v. United States,* 342 F. Supp. 1266, 1268 (D.C. N.J. 1972). The Commission's order carries a presumption of validity, because it is the product of expert judgment. *Metropolitan,*

supra, at 1268, citing *Interstate Commerce Commission v. Jersey City*, 322 U.S. 503, 64 S. Ct. 1129, 88 L.Ed 1420 (1944).

At the close of RMB's presentation before the Commission, the evidence established conclusively that a $1.00 reduction in the otherwise applicable rate, when a shipper delivered its shipment to the forwarder's terminal resulted in an unlawful rebate prohibited by Section 405(c) (49 U.S.C. 1005(c)) of the Interstate Commerce Act. Consequently, the allowance also was unjust and unreasonable, contrary to the standard imposed by Section 415 (49 U.S.C. 1015) of the Act. At a minimum, RMB's evidence was sufficient to raise a question as to reasonableness of the publication in the minds of reasonable men - thereby eliminating any possibility that a directed verdict could have been granted.

Petitioners next contend that the Administrative Law Judges in each proceeding wrongly placed the burden of proof upon TNT. This contention is without merit. Initially, it should be noted that there is nothing in the decisions of the Administrative Law Judges which indicates that TNT had the initial burden of proof. Secondly, as is noted in this Protestant's Reply to Respondent's Petition for Reconsideration and Further Hearing (JA 361a, 365a), in RMB's Opening Statement of Facts and Argument, Witness Anderson directed the Commission's attention to motor carrier pickup costs, as shown in the Commission's Cost Statement 2C1-71, Transcontinental Region, averring that pickup and delivery service is essentially similar, whether performed by motor carriers or freight forwarders. Then, setting forth a specific example

on a Transcontinental movement, the Protestants showed that the existing schedules would have provided an unlawful rebate for a shipper performing the involved pickup service, in violation of Sections 405(c) and 415 of the Interstate Commerce Act, 49 U.S.C. 1005(c) and 1015. This evidence also verified that the allowances, or dock rates, as Petitioners would call them, exceeded the just and reasonable level required under Section 415 of the Act. Having made this *prima facie* showing, the burden of going forward shifted to the Petitioners to justify the proposal. Having failed such justification, the Commission had no alternative but to find the tariff publication unjust and unreasonable, and order its cancellation. Furthermore, had TNT introduced no evidence at all before the I.C.C., the Commission's decision could not have differed. This is so precisely because of Intervenor RMB's submission of a *prima facie* case.

IV.

THE DIFFERENCES BETWEEN THE BUSINESS OF A FREIGHT FORWARDER AND A MOTOR CARRIER DO NOT JUSTIFY UNLAWFUL REBATES BY FREIGHT FORWARDERS.

At page 51 (Point VI) of their Brief, Petitioners spend considerable time noting the differences between freight forwarders as a mode of transportation and the regulated motor carriers. These distinctions do nothing to alter the fact that neither freight forwarders, nor motor carriers, may publish tariff provisions involving an allowance that is unjust and unreasonable, or publish tariff provisions which provide for an unlawful rebate. Indeed, the motor carriers are subject to provisions of the Interstate Commerce Act which are identical to

those of the forwarders with respect to these subjects. Thus, with respect to allowances, the forwarders are subject to provisions of Section 415 (49 U.S.C. Section 1015), while the motor carriers are subject to Section 225 (49 U.S.C. Section 324a). With respect to unlawful rebates, the forwarders are subject to the provisions of Section 205 (49 U.S.C. Section 1005), while the motor carriers are subject to the same provisions in Section 217(b) (49 U.S.C. Section 317). Thus, an unlawful allowance or rebate is prohibited for both modes.

Petitioners' renewed contention at page 54 of their Brief is that RMB submitted cost data that only pertained to motor carrier costs, not freight forwarder costs. Petitioners then proceed at the middle of page 54 to state the following:

> On the other hand, the record in this case contains the statement of Mr. Craig Rockey (JA 150a-159a, 173a-176a). This statement pertains to the cost of freight forwarders and is, in fact, the only evidence in the record that does so.

We respectfully invite this Honorable Court to thoroughly review the Verified Statement of Mr. Rockey which was identical in both the lead docket (JA 150a-159a) and in the *Sub No. 1 proceeding* (JA 351a-360a). We submit that review of that statement will show TNT has, in fact, failed to demonstrate any meaningful difference between forwarder, shipper and motor carrier costs involved in providing pickup service. As noted at the bottom of Attachment B of that statement (JA 158a and JA 359a), the source of the data submitted, and therefore the underlying base on which the computations were made, is shown as I.C.C. Publication, Statement No. 2C1-71, *Costs of Transporting Freight by Class I and*

Class II Motor Common Carriers of General Commodities, page 40. *This is precisely the cost statement which RMB utilized in presenting its prima facie case to the Commission.* Yet, Petitioners continue to allege that motor carrier costs are not applicable.

Petitioners' own witness, Mr. Rockey, as we have previously noted, indicated that pickup service could be performed by a freight forwarder using its own truck, by a local cartage company hired by the freight forwarder or shipper, or by the shipper himself, and he stated "There is no reason to assume that the physical operations, the equipment, or the man-hours required differ significantly as between these three types of operators." (JA 352a)

One additional comment is required with respect to Mr. Rockey's statement. In the Sub No. 1 proceeding, Mr. Rockey's statement first appeared in the Petition of Respondent TNT Tariff Agents, Inc., For Reconsideration and for Further Hearing, which was dated October 21, 1974 (JA 332a), and submitted some five months after the initial Decision of the Administrative Law Judge had been issued. Petitioner offered no explanation as to why this "cost evidence" had not been introduced in a timely fashion. The Commission, by Order dated March 6, 1975 (JA 378a), denied the Petitioner's request for reconsideration and further hearing. Thus, Mr. Rockey's statement was never admitted into evidence, nor did RMB ever have an opportunity to challenge the conclusions he drew.

Even had RMB not submitted any evidence with regard to forwarder costs, RMB's use of motor carrier pickup costs from the I.C.C.'s

Cost Statement showed that the allowance exceeded the cost shippers would incur in providing such service and shifted the burden of going forward to TNT to show what costs shippers would incur in providing the involved delivery service, or at a miminum, why motor carrier costs would be less than shipper costs. This TNT did not even attempt. It is apparent from the Decision that the Commission believed, as did Petitioners' own cost expert, that the costs of providing pickup service are similar, whether performed by a motor carrier or a shipper, and for that matter, a forwarder.

V.

THE I.C.C. WAS FULLY JUSTIFIED IN FINDING THE $1.00 PER 100 POUNDS UNJUST AND UNREASONABLE.

In Point VII of its argument, Petitioners take the position that the evidence of record was sufficient to support a showing that a $1.00 per 100 pounds allowance was justified when a shipper delivers a shipment to a forwarder's terminal. Petitioners then cite as justification the Verified Statement of Craig F. Rockey. Without arguing the merits of that statement, which, as we previously noted, was never admitted into evidence by the Commission, we direct the Court's attention to Attachment B of Mr. Rockey's statement in the Sub No. 1 proceeding (JA 359a). Even if we were to assume that Mr. Rockey's cost computations were valid, the last column of the cited table shows that on all shipments weighing 2,000 pounds or more delivered by a shipper to a forwarder the $1.00 allowance would exceed the shippers' costs and would result in a rebate. Thus, Petitioners' own evidence once again leaves the publication unlawful.

While TNT presented some evidence of the average size of shipments handled by freight forwarders generally (JA 356a), there is not one scintilla of evidence to indicate the size of shipments that are delivered by shippers to forwarders' terminals. It is quite possible that every shipper utilizing the involved publication would tender to the forwarder a shipment weighing 2,000 pounds or more. At any rate, assertions by the Petitioners that the evidence was adequate to meet the requirements of the I.C.C. clearly are erroneous.

Petitioners next (page 57) chide the Commission for its alleged failure to sanctify TNT's assertion that forwarder costs were "skyrocketing." This is not the first proceeding in which such a contention has been made by the forwarders and considered by the Commission. In *Investigation Into The Scope of Freight Forwarder Terminal Areas*, 343 I.C.C. 565, the Commission, in considering this same argument, stated at page 584:

> It is further argued that the costs of using regulated motor carriers for the performance of assembly and distribution services are prohibitively high. The forwarders note an increase of 65% in the rates for such service during the last 5 years. It reasonably appears, however, that while the costs of motor carrier service are high, there has been no satisfactory showing that the forwarders could perform these services with any real savings in terms of costs or time. These higher motor carrier rates represent further evidence of the growing inflation in this country, *and there is no indication that high operating costs could be avoided by the forwarders if they perform these services themselves.* (Emphasis supplied.)

Furthermore, in the Sub No. 1 proceeding, the Administrative Law Judge accurately characterized the Petitioners' assertion of skyrocketing costs as "largely unsupported." At any rate, it was the

Petitioners' total failure to submit any evidence of the costs for shippers who would be performing the service which led to the Commission's ultimate decision.

Petitioners next assert that the Commission has assigned an impossible burden to TNT to produce the costs of all shippers who would be affected by the proposal. We submit that the Petitioners know better. First, there is nothing in the decision of the Administrative Law Judge which indicates any requirement that each and every shipper affected by the publication would have to submit cost evidence in order to justify it. Secondly, such a contention is contrary to a number of Commission decisions in which allowances have been granted based on a representative showing of shipper costs. For example, in *Pickup and Delivery Allowance at St. Louis and Kansas City, supra,* an increased allowance was found just and reasonable, with cost evidence from a single shipper. Similarly, in *Forwarder Pickup Allowances at Los Angeles and Anaheim, Calif.,* 310 I.C.C. 469, certain freight forwarders, including the Petitioner herein, National Carloading Corporation, were permitted to increase an allowance based on the testimony of a single shipper. Thus, contentions by the Petitioner that it has an impossible burden are not well taken.

As we have previously shown, the burden imposed upon the forwarders to justify allowances is nothing more than the burden imposed by the controlling statute, 49 U.S.C. 1015, as interpreted through numerous decisions of the Commission and the Federal courts. If TNT has a quarrel with the burden, that quarrel lies with Congress.

VI.

TOTAL CANCELLATION OF THE SUBJECT TARIFF IS JUSTIFIED.

Petitioners argue that because some pickup costs might exceed the proposed $1.00 reduction, cancellation of the entire tariff provision is not justifiable. Petitioners then point to various cost evidence submitted *by the Intervenors* to justify its position. As noted previously, once Protestants submitted such evidence, the burden was on the Petitioners to justify the publication. Absent any justification whatsoever, the Commission was warranted in ordering cancellation of the entire publication. The door is not closed to the forwarders. They are free to republish allowances to apply only on shipments delivered by a shipper not exceeding a specified weight level which they feel their evidence can justify. Then, by submission of competent evidence to meet requirements of the statute, they should have no trouble justifying such a proposal. However, the wholesale establishment of $1.00 reductions for pickup service by shippers, without regard to the weight of shipments tendered, is totally unjustifiable.

VII.

THE DECISION OF THE I.C.C. AND THE CORRESPONDING ORDERS FULLY APPRISE TNT OF THE I.C.C.'S RATIONALE FOR ITS DECISION AND, THEREFORE, DID NOT DENY TNT DUE PROCESS OF LAW.

TNT's final argument (Point IX) contains such catch-all claims as "error has been built upon error," "the initial decisions of the Administrative Law Judges are erroneous in several respects," and "Neither Administrative Law Judge had any grasp of the issues before him." The record in this proceeding, however, does not support such

contentions. We have already noted that the "dock rates" involved an allowance, and the use of Commission precedents to determine whether the allowances were just and reasonable is fully proper in an investigation of effective rates.

Contrary to Petitioners' further contentions, the Administrative Law Judge has never placed the initial burden of proof on TNT, and had TNT stood mute, the Commission's decision could not have been different. Petitioners' contention that motor carriers' costs were of no probative value flies in the face of the very evidence they submitted, as noted previously in the statement of Craig F. Rockey (JA 351a). Furthermore, with such probative evidence before it, coupled with the total failure of TNT to rebut the *prima facie* case made by the Intervenors, the Commission was fully justified in issuing the orders now before the Court.

Certainly, review of the instant orders refutes TNT's allegations that the proceedings held "fell upon deaf ears." The succinct manner in which the Administrative Law Judges detailed the information submitted by all parties, coupled with their discussions and conclusions in which the issues were fully considered, confirms the full consideration given to the evidence of all parties. The grounds on which the administrative agency acted clearly are disclosed. As noted in the decision of the Administrative Law Judge in the Sub No. 1 proceeding (JA 314a):

> Upon consideration of all evidence of record, the Administrative Law Judge finds that the assailed schedules have not been shown to be just and reasonable and should be ordered cancelled.

Likewise, the conclusions on which those findings were based also are specific. Again, as the Administrative Law Judge noted (JA 313a):

> An allowance of any type can be no more than is just and reasonable. If it is more than just and reasonable, it constitutes a device for refunding, or remitting a portion of a freight forwarder's rates or charges, which rebating is outlawed by Section 404(c) (sic) of Part IV of the Interstate Commerce Act.

TNT's apparent contention that the Commission should have dealt specifically with each of its arguments at the agency review level is utterly without merit. The Commission is entitled to adopt as its own the findings and conclusions of the Administrative Law Judge without further comment. *T.S.C. Motor Freight Lines, Inc. v. United States*, 186 F. Supp. 777 (S.D. Texas 1960) aff'd., *Herrin Transportation Co. v. United States*, 366 U.S. 419 (1961), *Deioma Trucking Company v. United States*, 233 F. Supp. 782 (N.D. Ohio 1964). Thus, the Orders of the Commission fully explain themselves and are fully supported by the evidence of record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William E. Kenworthy, one of the attorneys for Intervenor, hereby certify that on the 12th day of August, 1975, I served copies of the foregoing Brief upon all parties of record by mailing two copies thereof to each of them by air mail, postage prepaid, and properly addressed.

Dated at Denver, Colorado, this 12th day of August, 1975.

William E. Kenworthy

ADDENDUM

Text of Statutes:

49 U.S.C. Section 15(13). Allowance for service or facilities furnished by shipper

If the owner of property transported under this chapter directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this chapter and shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section. Feb. 4, 1887, c. 104, Pt. I, § 15, 24 Stat. 384; June 29, 1906, c. 3591, § 4, 34 Stat. 589; June 18, 1910, c. 309, § 12, 36 Stat. 551; Feb. 28, 1920, c. 91, § 421, 41 Stat. 488; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; September 18, 1940, c 722, Title I, § 10(d), 54 Stat. 912.

49 U.S.C. Section 1005(c). Tariffs of freight forwarders

No freight forwarder shall charge or demand or collect or receive a greater or less or different compensation for or in connection with service subject to this chapter than the rates or charges specified therefor in its tariffs lawfully in effect; and no freight forwarder shall refund or remit in any manner or by any device any portion of the rates or charges so specified, or extend to any person any privileges or facilities in connection with such service and affecting the value thereof except such as are specified in its tariffs: *Provided,* That the provisions of section 22 of this title (relating to transportation free or at reduced rates), insofar as such provisions relate to transportation or service in the case of property, shall apply with respect to freight forwarders, in the performance of service subject to this chapter, with like force and effect as in the case of the persons and service to which such provisions are specifically applicable.

49 U.S.C. Section 1015. Allowances to shippers for transportation service

If the owner of property transported in service subject to this chapter directly or indirectly renders any service connected therewith, or furnishes any instrumentality used therein, the charge and the allowance therefor, to such owner, shall be published in tariffs filed

49 U.S.C. Section 1015 (continued).

in the manner provided in this chapter and shall be no more than is just and reasonable and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the freight forwarder or forwarders for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order. Feb. 4, 1887, c. 104, Pt. IV, § 415, as added May 16, 1942, c. 318, § 1, 56 Stat. 296.